BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The performance by Petitioner of part of the work through subcontractors did not affect its right to recover for the respondent's breach of contract nor the amount of such recovery.

THE EVIDENCE AS TO THE SUBCONTRACTORS.

At the time of the bid invitation petitioner solicited information from various other bus operators (41). Petitioner's original arrangement with its subcontractors was to pay them $18 a day per bus. Anything that was realized over that amount petitioner was to retain (41). Out of the $18 a day certain deductions were to be made for expenses in the performance of the contract. Petitioner agreed to supply the subcontractors with fuel and oil at cost (42). Because the number of persons or quotas ordered by the government was at great variance with the actual number furnished, petitioner's president told the subcontractors that he could not pay them $18 a day, that he was doing everything that he could to adjust the issues and suggested that petitioner pay the subcontractors on the basis of the contract price for the number of persons they actually transported and that subsequently if petitioner recovered any additional money on account of the variance being greater than what the contract provided for petitioner would compensate the subcontractors for the difference to their satisfaction. The subcontractors agreed to this arrangement (44). On the original arrangement of $18 a day for the subcontractors, petitioner had to stand the deductions made for late arrivals, as well as for a maintenance man, repair man, supervision and accounting (44, 45).

On cross-examination the president of petitioner testified that he never paid the subcontractors $18 a day, but that he paid them for the actual number of passengers carried by them (48). Petitioner reimbursed some of the subcontractors and had a definite arrangement with them for payment in the event petitioner was successful in its suit (48, 49). The job went bad within the first three or four days from the date it started. Buses were standing around and men were standing around (49). At no time did petitioner pay $18 a day to the subcontractors (49). The number of buses furnished by the subcontractors and by the petitioner during the periods of the three contracts is set forth on page 50 of the record, as well as in Plaintiff's Exhibit 3, which also gives the number of passengers carried by petitioner and by the subcontractors. Petitioner's arrangement with the subcontractors with respect to reimbursement to the subcontractors in the event petitioner was successful in this suit was entered into within the first two weeks (52). The subcontractors depended on the good faith of petitioner to pay them (52).

The case having been dismissed at the end of petitioner's (plaintiff's) case, all the evidence presented by petitioner is accepted as true and every inference that may be reasonably drawn therefrom is considered favorably to petitioner.

Lumbra v. *United States,* 290 U. S. 551.

Myers v. *American Wool Works,* 114 F. (2d) 252, cert. den. 313 U. S. 563.

Neilsen v. *Richman,* 114 F. (2d) 343, cert. den. 311 U. S. 705.

In *Hunt* v. *United States,* 257 U. S. 125, where a principal contractor had sublet an entire contract for the transportation of mail to a subcontractor who performed all the services required, this Court reversed a judgment of

the Court of Claims in which that Court dismissed a petition by the principal contractor to recover for services rendered under the contract on the ground that the principal contractor had no interest in the subject matter of the petition.

This Court said (p. 128):

> "The Government did not have and did not by implication recognize any contractual relations whatever with Travis (the subcontractor) and if he had failed in performing it would not have had any right of action against him for the subletting of such contract was forbidden by the statute except with the consent in writing of the Postmaster General which was never given. (C. 107, 20 Stat. 62, Section 2). Weighel (the principal contractor) was the only person legally bound to perform the original contract; it was from him that the Government demanded the extra services and under the facts found by the lower court the obligation to pay for that service was to him whether he performed it personally or through another."

In *Pneumatic G. C. & P. Co.* v. *United States*, 36 Ct. Cl. 71, 88, where subcontracts were referred to as the "common incidents" of building and other similar enterprises, it was held that where plaintiff's contract was broken by fault of the government, the government should answer without waiting for plaintiff to first pay the damages sustained by the subcontractors since these damages would not have been caused had the government kept faith with the principal contractor.

In *Stout* v. *United States*, 27 Ct. Cl. 385, it was held that the fact that a subcontractor was employed by the claimant and was to receive the same price which the contractor was to receive did not affect the recovery by the contractor nor the amount of such recovery, and the Court there said, page 387:

"A contractor has a right to make subcontracts. In the nature of things he must make them for he must hire labor, buy materials, procure transportation and fulfill through the agency of others the duties imposed upon him by his undertaking. He must not attempt to transfer his responsibility to the government; the government having selected him as the one with whom they wish to deal, he is not free to change that position. But he has a perfect right to fulfill his contract duties in the business manner which best pleases him providing he retain his personal responsibility and achieve the required result.

"The contract or understandings with the Maine Granite or the Hurricane Co. do not affect the recovery herein; these companies had and have no relations with defendants; they were plaintiff's instruments in fulfilling the contract; if they have sustained any loss, they must look to plaintiff for relief. A subcontract exactly like the one made with the Hurricane Co. appears in Masterton *v.* The Mayor (7 Hill., N. Y. 61) and as to it, Chief Justice Nelson said:

" 'Indeed I am unable to comprehend how these can be taken into account or become the subject matter of consideration at all in settling the amount of damages to be recovered for a breach of the principal contract' ".

And in *McNally* v. *State,* 170 Misc. 194, the New York Supreme Court relying on the decision of this Court in *Hunt* v. *United States,* 257 U. S. 125, *supra,* said:

"Sound reasoning extends to the contractor the right to recover from its defaulting promisor the amount of damages for which it would be liable to its subcontractor, even though it has not actually paid them."

II.

The measure of petitioner's damages was the amount agreed to be paid by the respondent for the transportation of the passengers ordered but not furnished.

It was found by the Trial Court that the petitioner duly performed all the terms of the contract on its part (R. 81).

In such case the amount of compensation agreed to be paid by the respondent is conclusive on the measure of the amount of recovery for the performance of the contract.

So. Pac. Ry. v. *United States*, 53 Ct. Cl. 332.

In an action for breach of contract to furnish trucking it has been held that the measure of damages is the contract price less the cost of making trips not required by reason of defendant's failure to furnish the freight for trucking.

Matson v. *Bradbury*, 10 Pac. 2d 376, 40 Ariz. 140.

A similar rule has been applied in actions for breach of contract for failure to furnish freight by a charterer.

Thebideau v. *Cairns*, 171 Fed. 233;

Dalbeattie S. S. Co. v. *Cano*, 59 Fed. 159;

Jordan v. *Eaton*, Fed. Cases #7520.

III.

The Circuit Court of Appeals having ruled that there was a breach of contract by the respondent should have remanded the cause for the purpose of permitting petitioner to prove its losses.

The Circuit Court of Appeals did not adopt the petitioner's contention that the contract price was the measure of damages. It should then have given petitioner an opportunity to prove its losses as damages.

A similar situation was presented in this Court in *Bulkley* v. *United States*, 86 U. S. 37. This Court there held that under the terms of the contract in that case the Government had unlimited discretion to change the notices as to the amount of freight to be furnished for transportation and that because of such unlimited discretion the Government had committed no breach of contract in failing to furnish freight as ordered. Nevertheless, this Court held that the plaintiff was entitled to recover for his loss of time,

trouble and expense in making ready to meet the requirements of the notices, although plaintiff might not recover his profits since there was no breach of contract. Notwithstanding the insistence of plaintiff in that case upon his profits both upon the trial and upon the appeal to this Court, the Supreme Court afforded him an opportunity upon a further trial to prove his losses.

Surely in this case where the Circuit Court of Appeals has on the facts actually found a breach of contract by the defendant, petitioner should have been given an opportunity to show the losses sustained by it resulting from the defendant's breach.

In the *Bulkley* case, supra, this Court said:

> "In making ready to meet the requirements of the notice, Bulkley was subjected to the loss of time, trouble and expense. He is entitled to be paid accordingly. Such is an implication of the contract and what is implied in a contract, deed, will or statute, is as effectual as what is expressed."

The obligation of the respondent in the instant case to pay for the passengers ordered but not furnished was as much a part of the contracts as the express promise to pay for passengers carried.

Conclusion.

Upon the grounds assigned, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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